IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SEAN LARAY MYERS, Appellant.	)	No. 61743-5-I DIVISION ONE UNPUBLISHED OPINION FILED: June 22, 2009

AGID, J.—Sean Myers appeals his domestic violence convictions for second degree assault, fourth degree assault, and felony harassment. He contends that the trial court erred by depriving him of a jury "of the county," by denying his motion to sever, and by imposing a sentence of life without parole based on prior convictions that were not proved to the jury beyond a reasonable doubt. By failing to renew the motion to sever, Myers waived severance. He also fails to show that had counsel renewed the motion, it would have been granted because the evidence was strong and cross-admissible on each count, he did not assert inconsistent defenses, and the trial court properly instructed the jury to consider each crime separately. His additional claims that his right to an impartial jury was violated and that the State was required to prove his convictions to a jury have been already rejected by our state and federal Supreme

Courts. Accordingly, we affirm.

FACTS

Myers dated Sabrina Tull for approximately three years. He lived with Tull and her two children off and on during the relationship. Tull was subjected to physical abuse throughout the course of the relationship, which ended in June 2006. It began when Myers slapped her in the face during arguments over Tull's refusal to throw away pictures of her children's father and her refusal to change her hairstyle. Tull was not injured in either incident and did not call the police.

A few months later, around Christmas 2003, Myers hit Tull in the mouth and split her lip when she tried to take some food to her parents. In September 2004, Myers punched Tull in the eye and the next day, hit her in the eye with a telephone. A neighbor called the police, and Myers was arrested, despite Tull's refusal to cooperate with the police. She was treated at the hospital for a laceration above her eye. Myers was charged with fourth degree assault and pled guilty.

In September 2005, during another argument with Myers, Tull grabbed a hammer to defend herself, but Myers took it from her and hit her on the back with it. He also hit her in the back with a chair. Tull did not call the police or seek medical treatment, but disclosed the incident to a friend.

In November 2005, Myers hit Tull in the face with an iron during an argument and fractured her cheekbone. She sought medical treatment but did not fully disclose

the cause of her injuries to the treating medical personnel, reporting that they were caused by an unknown male assailant. Tull suffered multiple injuries from this assault, including a fractured cheekbone, a laceration under her eye that required stitches, a split lip, and a contusion on her upper eyelid.

In January 2006, Myers threw a glass of water at Tull's face. Tull blocked her face with her arm, and the glass hit her arm and shattered, cutting her and causing permanent scarring. Tull did not call the police or seek medical attention for the injuries.

In May 2006, over the Memorial Day weekend, several incidents occurred that culminated in the current charges. On Friday, May 26, 2006, Myers demanded money from Tull and threatened her with a butcher knife when she told him her account was overdrawn. He told her to call the bank to try to get some more money, kept the knife pointed at her while she was on the phone, and threatened to stab her if she alerted anyone about what was going on. He also jabbed the blade at her body, including her side, her heart, and her face, and Tull feared he was going to stab her. He also told Tull that "nobody get[s] up out of here today." Tull took this as a threat to kill her and her two daughters, who were at the apartment at the time. Tull did not call the police that day because she was afraid he would harm her before the police arrived.

On Sunday afternoon, May 28, 2006, Myers hit Tull in the head with the heel of a boot during an argument. He also armed himself with the same butcher knife he used

on Friday and began jabbing it at her. At one point, he poked her beneath the eye, cutting her and causing her to bleed. He began demanding money from her again and threatened to stab her if she did not give him some money. She then called her friend Michelle Rhodes and asked to borrow $20. Rhodes met Tull in the parking lot and gave her $20. Rhodes saw the injury under Tull's eye, but Tull did not tell her about the assault nor did she call the police.

On Tuesday evening, May 30, 2006, Myers tried to hit Tull with a pair of pliers while she was taking a bath. Tull grabbed the pliers before he could hit her, but he grabbed a broken towel rack and threatened to hit her with it. She was not injured during this incident and did not call the police.

The next day, Tull called a friend for help. At her friend's insistence she went to the Des Moines Police Department and gave a brief verbal statement about the abuse that she suffered over the weekend. She had several visible injuries at the time when she spoke with the officer. Tull then stayed with her friend until Myers was arrested on June 2, 2006.

The State charged Myers with three counts of domestic violence second degree assault (counts I, II & IV), one count of domestic violence fourth degree assault (count III), and one count of domestic violence felony harassment (count V). All of the charges were based on the incidents that occurred over the Memorial Day weekend,[1] except for

[1] Count I of second degree assault was based on the May 26 incident with the butcher knife; count II of second degree assault was based on the May 28 incident with the butcher knife; count III of fourth degree assault was based on the May 28 incident when she was hit

one of the second degree assault charges (count IV), which was based on the incident that occurred on November 10, 2005, when she was hit with the iron. Myers moved to sever this count from the remaining counts. The trial court denied the motion. The court also admitted evidence of the other uncharged incidents under ER 404(b).[2]

At trial, Myers denied the allegations, claiming that Tull fabricated the charges because she was jealous of his ongoing relationship with the mother of his children, who gave birth to Myers' second child while he and Tull were still dating. He also argued that she claimed she was a victim of domestic violence to avoid eviction from her government subsidized housing because she was being investigated by authorities for back-due rent and for allowing Myers to live there in violation of the rules. Additionally, he asserted an alibi defense to the May 26, 2006 charges, claiming that he spent the Memorial Day weekend at a motel with Quantica Adamson, the mother of his children. Both he and Adamson testified that they were together from Friday afternoon, May 26, 2006, until Sunday afternoon, May 28, 2006, and that Myers was with her to see his three month old son for the first time.

In rebuttal, the State presented recordings of jail telephone conversations between Myers and Adamson, in which he expressed anger at Tull for calling the police on him and said she prevented him from seeing his son, who he had not seen yet except in pictures. In other calls, Myers questioned Adamson about her anticipated

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with the boot, and count IV of felony harassment was based on the May 26 incident when he threatened to stab Tull and threatened Tull and her children.

[2] Myers does not appeal this ruling.

testimony to confirm the timeline of events in case he had to testify before her.

The jury found Myers guilty as charged on all counts. The jury also found by special verdict that Myers was armed with a deadly weapon during the commission of the crimes charged in counts I, II, and V. At sentencing, the trial court found him to be a persistent offender and sentenced him to a mandatory sentence of life imprisonment without the possibility of parole on all but the misdemeanor fourth degree assault charges.

DISCUSSION

I. Right to Jury "of the County"

Myers first contends that the trial court violated his right to an impartial jury of the county because the jury was drawn from only a portion of the county. He argues that RCW 2.36.055 and King County Local General Rule (LGR) 18 (in effect at the time of his trial), which allow the court to limit the jury pool to a portion of the county,[3] violate

[3] RCW 2.36.055 provides:

> In a county with more than one superior court facility and a separate case assignment area for each court facility, the jury source list may be divided into jury assignment areas that consist of registered voters and licenses drivers and identicard holders residing in each jury assignment area. Jury assignment area boundaries may be designated and adjusted by the administrative office of the courts based on the most current United States census data at the request of the majority of the judges of the superior court when required for the efficient and fair administration of justice.

LGR 18 provides:

> *Designation of Jury Assignment Areas.* The jury source list shall be divided into a Seattle jury assignment area and a Kent jury assignment area, that consist of registered voters and licensed drivers and identicard holders residing in each jury assignment area. The area within each jury assignment area shall be identified by zip code and documented on a list maintained by the chief administrative officer for the court.

article I, section 22 of Washington's constitution, which gives criminal defendants the right to "a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed." The Washington Supreme Court has recently rejected this argument in State v. Lanciloti, holding that "the legislature was within its power to authorize counties with two superior courthouses to divide themselves into two districts."[4] We adhere to that holding and similarly dispose of Myers' claim here.

Myers further argues that the statute and rule violate his Sixth Amendment right to an impartial jury composed of a fair cross section of the community. He asserts, without support in the record, that "[t]he statute and rule in this case systematically and effectively exclude from jury service a distinct segment of the population of King County." But in addressing the identical claim, the Lanciloti court concluded that on "the scant factual record of the actual makeup of the jury source lists," the defendant failed to carry his burden of showing a systemic exclusion of a distinctive group.[5] Thus, the court declined to consider "this unripe claim."[6] There, the defendant noted that the populations of the two King County jury districts varied based on income, home ownership, and education, but did not develop the record to show that the jury source lists mirror these differences.[7] Here, Myers does not rely on even a "scant" factual record to support his claim of systemic exclusion. Thus, as in Lanciloti, he has not met

[4] 165 Wn.2d 661, 671, 201 P.3d 323 (2009).
[5] Id. at 672.
[6] Id.
[7] Id. at 671-72.

his burden of showing that the statute is unconstitutional, and we decline to substantially consider this unripe claim.[8]

[8] Id. at 672.

II. Motion to Sever

Next, Myers contends that the trial court erred by denying his motion to sever the second degree assault charge based on the November 2005 incident. He contends that "there is great danger that the jury may have used the evidence of one of the crimes charged or of the uncharged incidents to infer a criminal disposition to find [him] guilty of the other crimes charged," and that the jury "may have cumulated the evidence of the various crimes to find guilt." The State responds that because he failed to renew the motion at the close of trial, he has waived this issue on appeal. Myers counters that if the issue was waived, counsel was ineffective for failing to raise it again at the close of trial.

CrR 4.4(a) requires a defendant to make a pretrial motion to sever and, if overruled, to renew the motion before the close of the evidence. If the defendant fails to do either, severance is waived and cannot be raised on appeal.[9] Myers concedes that he did not renew the motion at the close of the evidence. He has therefore waived the issue on appeal. Thus, we address Myers' argument that his attorney's failure to renew the severance deprived him of effective assistance of counsel.

To establish a claim of ineffective assistance of counsel, the defendant has the burden to show that (1) counsel's performance fell below a minimum objective standard of reasonableness and (2) but for counsel's errors, there is a reasonable probability

[9] State v. Henderson, 48 Wn. App. 543, 551, 740 P.2d 329, review denied, 109 Wn.2d 1008 (1987).

that the trial's result would have been different.[10] Deficient performance may not be established by legitimate trial strategy or tactics.[11] The defendant must establish both prongs to prevail on an ineffective assistance of counsel claim.[12] To prevail on an ineffective assistance of counsel claim based on counsel's failure to renew a motion to sever, the defendant must show both that the motion should have been granted if made and that but for the deficient performance, there is a reasonable probability that the outcome of the trial would have been different.[13]

A court must grant severance if the court determines that it "will promote a fair determination of the defendant's guilt or innocence of each offense."[14] We will reverse a trial court's denial of a motion to sever only for a manifest abuse of discretion.[15] A defendant seeking severance must show that a trial on multiple counts would be "so manifestly prejudicial as to outweigh the concern for judicial economy."[16] Any potential prejudice arising from joinder of multiple counts is mitigated when: (1) the State's evidence is strong on each count; (2) the defenses are clear on each count; (3) the trial court instructs the jury to consider each count separately; and (4) the evidence of each count is admissible on the other count, even if not joined for trial.[17]

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[10] State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

[11] State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

[12] State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

[13] State v. Standifer, 48 Wn. App. 121, 125-26, 737 P.2d 1308, review denied, 108 Wn.2d 1035 (1987).

[14] CrR 4.4(b).

[15] State v. Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990).

[16] Id. at 718.

[17] State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994), cert. denied, 514 U.S.

Here, Myers fails to show that a renewed motion to sever would have been granted. First, the evidence was strong on each count. Most of Tull's testimony about each of the incidents was corroborated by evidence of visible injuries witnessed by third parties, including medical personnel, the police, and Tull's friends. The defenses were also clear on each count: except for the alibi defense to the May 26, 2006 charges, Myers' defense was a general denial of the allegations. Myers fails to show that the addition of the alibi defense rendered his other defenses inherently inconsistent or antagonistic; rather, the alibi defense was consistent with his general denial that any of the incidents occurred. Additionally, the trial court properly instructed the jury to consider each count separately by giving the following instruction: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count."[18]

Finally, Myers fails to show that the evidence was not cross-admissible on each count. As the State points out, the trial court admitted evidence of the uncharged incidents under ER 404(b) and Myers does not appeal this ruling. Thus, given this ruling, evidence of each count would have been similarly cross-admissible even if they were each tried separately. Evidence of the November 2005 fourth degree assault, along with the uncharged incidents, would have been admissible in the trial of the Memorial Day incidents to prove the "reasonable fear" element of the felony

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1129 (1995).

[18] This instruction mirrors WPIC 3.01.

harassment charge.[19] It would have also been admissible to explain Tull's delay in reporting the Memorial Day weekend assaults, as evidence of the Memorial Day assault would be admissible to explain the lengthy delay in reporting the November 2005 charge.[20] Thus, even if the November 2005 second degree assault charge had been severed from the remaining charges, the same evidence would have been admitted in each trial. Myers has therefore failed to establish that the trial court would have granted severance had counsel renewed the motion or that there was any resulting prejudice. Thus, his ineffective assistance of counsel claim fails.

III. Right to Jury Trial for Persistent Offender Sentence

Finally, Myers contends that his sentence of life imprisonment without the possibility of parole, imposed under the Persistent Offender Accountability Act (POAA), violates the Sixth and Fourteenth Amendments of the United States Constitution because the convictions upon which the sentence was based were not proved to a jury beyond a reasonable doubt. But as Myers acknowledges,[21] both the United States Supreme Court and the Washington Supreme Court have repeatedly rejected this argument, holding that recidivist factors need not be proved to a jury.[22] We adhere to

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[19] See State v. Barragan, 102 Wn. App. 754, 759, 9 P.3d 942 (2000) (victim's knowledge of defendant's prior violent acts relevant to reasonable fear element of harassment).

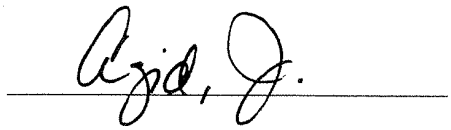
[20] See State v. Wilson, 60 Wn. App. 887, 891, 808 P.2d 754 (defendant's prior assaults against victim admissible to show victim's fear of defendant and to explain delay in reporting), review denied, 117 Wn.2d 1010 (1991).

[21] Myers explains that he raised the issue to preserve it for federal review in the event the law changes.

[22] Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (recognizing that with the exception of "the fact of a prior conviction," any fact that

these holdings and likewise reject his argument.

We affirm the judgment and sentence.



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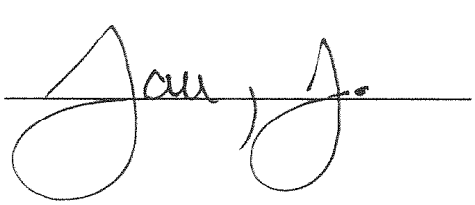

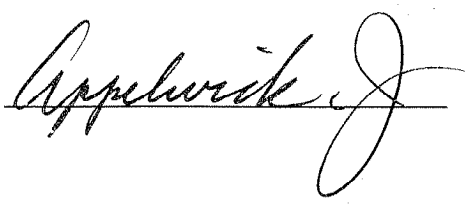

increases a penalty beyond the statutory maximum must be proved to a jury beyond a reasonable doubt); Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (reaffirming Apprendi's explicit exemption of criminal history from the rule requiring that aggravating factors in support of an exceptional sentence be proved to a jury); State v. Thiefault, 160 Wn.2d 409, 418, 158 P.3d 580 (2007) (Apprendi does not require prior convictions used to establish POAA status be proved to a jury); State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003) (no state or federal constitution right to have prior convictions proved to jury at sentencing), cert. denied, 541 U.S. 909 (2004); State v. Wheeler, 145 Wn.2d 116, 123-24, 34 P.3d 799 (2001) (recognizing that United States Supreme Court decisions holding that recidivist factors need not be pled and proved beyond a reasonable doubt are still good law), cert. denied, 535 U.S. 996 (2002).